No. 89-373

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL. IN OPPOSITION

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QUESTION PRESENTED

Whether 42 U.S.C. 7409(d)(1) imposes a non-discretionary duty on the Administrator of the Environmental Protection Agency to engage in notice and comment rulemaking before deciding not to revise national ambient air quality standards for sulfur oxides.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-21a, is reported at 870 F.2d 892. The opinion of the district court, Pet. App. 22a-45a, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. 48a, was entered on March 22, 1989. A petition for rehearing was denied on June 8, 1989. Pet. App. 49a. The petition for a writ of certiorari was filed on September 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Seven states and four environmental groups brought suit in the United States District Court for the Southern District of New York to compel the Administrator of the Environmental Protection Agency to revise the national ambient air quality standards (NAAQS) for sulfur oxides. The district court dismissed the suit for lack of subject matter jurisdiction. The court of appeals reversed on the ground that the district court had jurisdiction "to compel the Administrator to take some formal action, employing rulemaking procedures * * * either revising the NAAQS or declining to revise them." Pet. App. 18a. The court of appeals accordingly remanded the case to the district court.

1. The states and environmental groups brought a "citizen suit[]" in the district court under 42 U.S.C. 7604, Pet. App. 24a, which provides that "any person may commence a civil action on his own behalf * * * against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator." The states and environmental groups contended that the Administrator had a non-discretionary duty under 42 U.S.C. 7409(d)(1) to revise the national ambient air quality standards for sulfur oxides.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 43a, 45a. In the court's view, the mandatory language of Section 7409(d)(1) imposes a non-discretionary duty on the Administrator to *review* periodically the air quality standards governing sulfur oxides. At the same time, however, the court reasoned that the permissive language of that Section applicable to *revisions* of air quality standards means that the Administrator has discretion not to revise those standards. Section 7409(d)(1) provides:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator *shall* complete a thorough *review* of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and *shall* make such *revisions* in such criteria and standards and promulgate such new standards *as may be appropriate* in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

42 U.S.C. 7409(d)(1) (emphasis added). By providing that the Administrator shall make such revisions "as may be appropriate," the district court explained, Section 7409(d)(1) entrusts revision of the sulfur oxides standards to the Administrator's sound discretion. First, the qualifying term "may" indicates that the Administrator's authority is permissive. Pet. App. 32a (citing *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947)). Second, the determination of what is appropriate "clearly calls for the exercise of discretion and expert judgment." Pet. App. 32a. Accordingly, the district court "reject[ed] the proposition that [the Administrator was] under a nondiscretionary duty to revise the standards for sulfur oxides." *Id.* at 34a & n.5.

2. A divided panel of the court of appeals reversed and remanded. The majority agreed with the district court that "[t]he words 'as may be appropriate' clearly suggest that the Administrator must exercise judgment" under Section 7409(d)(1). Pet. App. 14a. But the majority also held that "the presence of 'shall' in the section implies * * * that the district court has jurisdiction to order the Administrator to make *some* formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion." *Ibid.* See *id.* at 12a-14a, 17a-18a.

One week after the district court's decision, the Administrator had published a "Proposed Decision not to Revise the National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)," 53 Fed. Reg. 14,926 (1988), and invited public comment. In light of the Administrator's notice of proposed rulemaking, the court of appeals remanded "so the district court can enter an order directing the Administrator to continue the rulemaking to formal decision." Pet. App. 18a.

Judge Mahoney dissented. In his view, the requirement in Section 7409(d)(1) that the Administrator "shall" make revisions "as may be appropriate" does not impose a date-certain deadline by which time all specified agency action must be completed so as to impose a non-discretionary duty of timeliness under *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987). Pet. App. 20a. Because of the lack of a non-discretionary duty, he reasoned, the district court did not have subject matter jurisdiction under the "citizens suit" provision. 42 U.S.C. 7604. Only the Court of Appeals for the District of Columbia Circuit would have jurisdiction over the sulfur oxides standards on review of a rule promulgation or other "final action" by the Administrator. 42 U.S.C. 7607(b). Judge Mahoney therefore concluded that this case falls within the rule of *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), which held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Circuit Court of Appeals." Pet. App. 21a.

Judge Mahoney emphasized that dismissing the suit for lack of subject matter jurisdiction would not create a "bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." Pet. App. 19a. The states and environmental groups could

have invoked the procedure outlined in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975), under which they would have petitioned EPA for revision of the sulfur oxides standards. If the Administrator denied their petition, the states and environmental groups could have sought review of that "final action" in the Court of Appeals for the District of Columbia Circuit under 42 U.S.C. 7607(b).

ARGUMENT

1. We agree with petitioners that the court of appeals' decision is in error. As the district court and Judge Mahoney correctly observed, 42 U.S.C. 7409 requires the Administrator to *review* national ambient air quality standards periodically, but it does not impose a nondiscretionary duty to *revise* such standards that would be enforceable in a "citizens suit" brought by the states and environmental groups in this case.

Although Section 7409(d)(1) does not impose a nondiscretionary duty to revise national ambient air quality standards, the states and environmental groups could have petitioned the Administrator to revise the sulfur oxides standards under the procedure outlined in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975). We disagree with the panel majority's characterization of the *Oljato* procedure as "dictum" that was made "obsolete" by the 1977 amendments to the Clean Air Act, 42 U.S.C. 7401 *et seq.* Pet. App. 11a n.1. The majority's disparagement of *Oljato* is inconsistent with the Second Circuit's earlier decision in *New England Legal Foundation* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981), and with the decisions of other courts of appeals that have explicitly approved the *Oljato* procedure subsequent to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, see Pet. 21.

2. The court of appeals' decision nevertheless does not warrant further review because it is unlikely to have a significantly adverse effect on EPA's procedures and because there is no conflict among the lower courts on the precise question presented in this case.

a. It would be premature to conclude that the court of appeals' decision will have a significant impact on EPA's implementation of 42 U.S.C. 7409. EPA's current practice under that Section is to initiate a rulemaking and solicit public comment on proposed decisions not to revise national ambient air quality standards. See, *e.g.*, 49 Fed. Reg. 6,866 (1984) (nitrogen dioxide); 45 Fed. Reg. 55,066 (1980) (carbon monoxide); 43 Fed. Reg. 26,962 (1978) (ozone). The court of appeals' erroneous interpretation of Section 7409(d)(1) to impose this same requirement will therefore not disrupt agency decisionmaking at this time.[1]

Significantly, the court of appeals correctly recognized that the Administrator has discretion whether to revise national ambient air quality standards and how they should be revised. The court unequivocally rejected the contention by the states and environmental groups that the Clean Air Act requires the Administrator to revise the sulfur oxides standards and instead recognized that Congress has entrusted that decision to the Administrator's sound discretion. Petitioners' assertion that the panel majority authorized district courts to "review scientific data and order the Agency to engage in rulemaking based on the results of that review" is thus inaccurate. Pet. 9. Indeed, the Second Circuit's subsequent decision in *Natural Resources Defense Council, Inc.* v. *Thomas*, No. 88-6210 (Sept. 18, 1989), slip

[1] Should the reasoning of the panel majority be applied to require rulemaking under a comparable statute where an agency had not independently decided to solicit public comment on a proposed decision not to take a particular action, review by this Court might be appropriate.

op. 5716, confirms that the decision below does not "authorize any action on our part to direct the substance, rather than the timing, of the Administrator's action, as NRDC here seeks." The court of appeals' decision thus affirms the Administrator's discretion to decide whether and when new scientific information warrants revision of air quality standards.[2]

b. Nor does the court of appeals' decision directly conflict with this Court's decisions in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). We agree with petitioners that the court of appeals should have deferred to the Administrator's construction of Section 7409(d)(1) and that that Section imposes no requirement that the Administrator formally decide whether to revise air quality standards. Cf. Pet. 16-17 & n.52. But the court of appeals' failure to give appropriate deference and its erroneous imposition of a formal decision requirement at most simply misapplies the legal standards in *Chevron* and *Vermont Yankee*. Not every misapplication of a legal standard articulated by this Court creates a conflict of decisions meriting this Court's review. On the precise issue that the court of appeals decided here—whether Section 7409(d)(1) imposes a non-discretionary duty on the Administrator to make a formal decision whether or not to revise national ambient air quality standards—there is no conflict of decisions.

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[2] Moreover, Congress is presently considering legislation to amend the Clean Air Act by specifically addressing the issue of acid rain. See, *e.g.*, H.R. 3030, S. 1490, and S. 57, 101st Cong., 1st Sess. (1989). This could result in a substantial change in the statute governing EPA's substantive duties in relation to sulfur oxides.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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